NO. 56778-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DISH NETWORK LLC,
Respondent/Cross-Appellant,

v.

DEPARTMENT OF REVENUE,
Appellant/Cross-Respondent.

REPLY BRIEF ON CROSS-APPEAL OF DISH NETWORK LLC

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INTRODUCTION

As DISH's cross-appeal explained, after the Superior Court properly found that the Department must be estopped from repudiating its directives to DISH in the 2008 Workpaper, the proper remedy was to refund the full tax, penalties, and interest the Department demanded based on its repudiation. Only that result does what estoppel is supposed to: Hold the Department to the position in its original statement. Instead, by permitting the Department to retain the belatedly-charged tax, the Superior Court gave the Department the retroactive benefit of the very contradiction the Court purported to estop.

Nowhere in the Department's response brief does it explain how this result accords with the logic or law of estoppel. It points to no authority in which a court imposed a remedy that failed to hold the estopped party fully to its initial statement. Its lead argument is merely that the Superior Court had discretion in fashioning a remedy. But aligning the remedy for estoppel with the underlying right protected by an estoppel

claim is not a matter of discretion. A court has no more discretion to award an incomplete remedy in an estoppel case than it does to award tort damages in a contract case. The Superior Court's error on the remedy for estoppel is one of law, and the Department provides no law to support it. *Infra* § I.

The Department's second argument has nothing to do with the Superior Court's *remedy* at all. Puzzlingly, the Department argues that "DISH does not meet the necessary elements of estoppel with respect to [the] B&O tax." DOR RB 50.[1] This is pure confusion. There is one estoppel claim in this case, equally applicable to taxes, penalties, and interest. It is the one the Superior Court found established, and the one that is at issue in the Department's appeal. The Department has never before posited some separate estoppel analysis applicable only

[1] DISH's Principal Brief is cited "DISH Br.," the Department's Opening Brief "DOR OB," and the Department's Reply and Response "DOR RB." References in this brief to a refund of all B&O taxes include a refund of pre-2009 interest requested in the cross-appeal. *See* DISH Br. 60, 71.

to the tax portion. And certainly this new concept had nothing to do with the Superior Court's remedy.

Given the novelty of the Department's new tack, it is little surprise that its underlying premises find no support in the record or case law. Most notably, the Department's argument—and much of its reply on its appeal—depends on the repeated assertion that DISH "admits it owes" the additionally assessed B&O tax. *E.g.*, DOR RB 2-3, 50. That is false. DISH conceded no such thing, the Department proved no such thing, and the Superior Court found no such thing. And it is legally inconsequential anyway: Like any estoppel claim, DISH's is based on the Department's repudiation of express guidance, regardless of whether the Department was right the first or second time. The Superior Court properly ruled for DISH on this claim. *Infra* § II.

The reality of this case remains straightforward. The Department gave DISH express guidance on how to pay taxes under a notoriously vexing statute. DISH's tax payments were

in accord. Then the Department changed its guidance—even though the law remained the same—and retroactively assessed DISH millions in taxes, penalties, and interest. That is not a fair way to treat a taxpayer. And that unfairness deserves a complete remedy. This Court should overturn the Superior Court's decision not to grant DISH a full refund.

ARGUMENT ON CROSS-APPEAL

I. The Superior Court's Incomplete Remedy Contravenes Fundamental Principles Of Estoppel.

The Department does not contest that an established estoppel claim would fully bar its 2012 contradiction of the 2008 Workpaper. Instead, it argues that the Superior Court had discretion not to remedy that contradiction's full effects. But a court has no discretion to undercut a claim by affording a legally incomplete remedy. *Infra* § I.A. And the Department fails to distinguish the many cases finding that a full refund is appropriate. *Infra* § I.B.

A. The Superior Court's remedy is based on an error of law to which no deference is owed.

1. The fundamental principle of equitable estoppel, as DISH's Brief explains, is that "a party should be held to a representation made where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (internal quotation marks omitted); *Engelland v. First Horizon Home Loans*, 180 Wn. App. 1018, at *4 (2014) (unpub); *see* DISH Br. 62-63, 67-68. The repudiating party is held to its *first* statement, because "[u]nder the doctrine of equitable estoppel, the fraud is the inconsistent position subsequently taken, rather than the original conduct." *Oakbrook, 7th Addition Homeowners Ass'n v. Newhouse,* 142 Wn. App. 1006, at *7 (2007) (unpub) (quoting 28 Am. Jur. 2d, Estoppel and Waiver § 71, at 496 (2000)).

That doctrine is simply applied here: DISH's estoppel claim operates to hold the Department to its 2008 position that

programming costs should not have been included as in-state costs in calculating DISH's B&O tax.

The remedy is equally straightforward: DISH must be placed in the position it would have been in if the Department had never reneged. Doing that requires a full refund of the additional B&O tax, charged because the Department took a new position on the treatment of programming costs. Only a full refund holds the Department to its 2008 position that such costs should not be included as in-state costs. And so only a full refund properly "match[es] right and remedy," as bedrock remedial principles require. Dobbs on Remedies § 1.7, at 21 (3rd ed. 2018) (capitalization omitted). Anything less betrays estoppel's basic prohibition on a party "asserting a claim ... that contradicts" what it said "before." DISH Br. 63 (citing *Estoppel*, Black's Law Dictionary (11th ed. 2019)); *see Silverstreak, Inc. v. Wash. State Dep't of Lab. & Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007).

The Superior Court's remedy is erroneous in precisely that respect. DISH Br. 67-71. The Court was rightly inclined to make DISH "whole." 4 RP 16. But it attempted to do so by "put[ting] the parties in [the] position they would have been" if the Department had initially asserted that DISH owed the additional B&O tax. 4 RP 15; *see* DISH Br. 67. That is, the Court aimed to *replace* the Department's prior statement with its later statement, rather than *holding* the Department to its prior statement. Its remedy was thus an improper departure from "the nature and scope of the underlying right." Dobbs § 1.7, at 22.

The Department disputes none of this. That alone should resolve the cross-appeal: The Superior Court erred as a matter of law, and this Court should reverse and order a full refund.

2. The Department's principal response is to argue that the Superior Court's mistake of law was actually an exercise of discretion. DOR RB 50-52. It says that "[u]nlike the *application* of an equitable remedy, which is a question of law reviewed de

novo, courts review the fashioning of equitable remedies for an abuse of discretion." DOR RB 50 (internal quotation marks omitted).

But DISH's challenge here plainly *is* a challenge to "the *application* of an equitable remedy," and thus *is* reviewed de novo. *See id.* Again, DISH's argument is that the Superior Court applied the wrong legal standard by issuing a remedy that conflicts with the underlying legal claim.

In any event, even treated as an act of discretion, the Superior Court's remedy fails. "If a trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion." *State v. B.O.J.*, 194 Wn.2d 314, 322-23, 449 P.3d 1006 (2019); *see Sastrawidjaya v. Mughal*, 196 Wn. App. 415, 418-19, 384 P.3d 247 (2016). DISH challenges legal error, which is a per se abuse of discretion. So the Department's contention that DISH "does not offer any argument under [an abuse of discretion] standard of review," DOR RB 51, is empty.

B. Ample case law establishes that the appropriate remedy is a full refund.

1. In tax estoppel cases like this, the remedy that matches estoppel's "right" is a refund of the entire unexpected tax. *Harbor Air* shows this. There, after upholding an estoppel claim based on the Department's misleading letter suggesting that the taxpayer was liable for only months of additional tax, the Supreme Court affirmed the refund of the years' worth of unexpected additional tax. *Harbor Air Serv., Inc. v. State, Dep't of Revenue*, 88 Wn.2d 359, 367-68, 560 P.2d 1145 (1977); *see* DISH Br. 63-64.

The similar result in tax cases challenging regulatory repudiations reflects the same principle. In *Hansen Baking* and its progeny, the Court upheld refunds of all the late-assessed taxes because "taxing authorities may not retroactively impeach their own rulings and thereby collect back taxes." DISH Br. 64-66 (citing *Hansen Baking Co. v. City of Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956), *Port of Seattle v. State, Dep't of Revenue*, 101 Wn. App. 106, 118, 1 P.3d 607 (2000), and others).

2. Rather than confront the plain doctrinal through-line in these cases, the Department attempts a series of dubious distinctions.

a. The Department first takes on *Harbor Air*, noting that it applied "estoppel under the lower preponderance of the evidence standard." DOR RB 22 (citing *Laymon v. Wash. State Dep't of Nat. Res.*, 99 Wn. App. 518, 526 n.5, 994 P.2d 232 (2000)). But the underlying standard of proof for an estoppel claim has no bearing on the legal contours of the remedy for such a claim. On the latter question, *Harbor Air* fully supports the requirement of a full refund (and likewise supports DISH's estoppel claim as a whole, *see* DISH Br. 23, 27-29, 45, 47).

Nor is the Department correct when it cites a footnote in *Laymon* to insinuate that this Court found *Harbor Air* "not persuasive." DOR RB 22. This Court found that "the [appellants'] *reliance*" on *Harbor Air* was "not persuasive" in resolving an entirely different question not presented here (the distinction between legal and factual statements). 99 Wn. App.

at 526 n.5 (emphasis added). And the Supreme Court cited *Harbor Air* approvingly in *Kramarevcky*, disproving the Department's suggestion that *Harbor Air* has been somehow discredited. *See* 122 Wn.2d at 744.

The Department's factual distinctions are similarly uncompelling. That *Harbor Air* is not about the "failure to correct a mistake by the taxpayer in a prior audit" makes it more, not less, on point. DOR RB 23. Both *Harbor Air* and this case are about the government's affirmative statements. DISH Br. 30-34.

Nor is there a difference between the "express statement" about Harbor Air's limited tax exposure and "DISH's *inference* from the 2008 audit workpaper." DOR RB 24. The key statement in *Harbor Air* came from the Department's express assertion about the time period covered by the audit. The inference was that because "there [wa]s nothing in the letter to suggest that the audit would cover any period prior to January 1, 1972," the tax exposure began only in 1972. DISH Br. 28

(citing 88 Wn.2d at 367). Just the same, the 2008 Workpaper contained an affirmative instruction to exclude programming costs, which created the inference that this was the proper approach to use and carry forward. DISH Br. 11-13, 28-29, 41-43.

b. The Department next turns to *Hansen Baking* and its progeny, asserting that the cases have "no bearing on any issue" because the Department is not "repudiat[ing an] administrative rule … or any other properly promulgated ruling." DOR RB 26. So what? Whether these cases bar repudiations of written instructions (like the Workpaper) or of formal administrative rulemaking (like a regulation), they are all about the proper way to remedy a wrongful repudiation. This Court need not ignore obviously pertinent legal principles merely because they arise in a slightly different legal context.

Indeed, these cases are animated by the same fairness principle underlying estoppel: that "taxpayers would never be able to close their books with assurance," if the Department

could, "years later," "retroactively impeach its own general rules because of asserted errors of fact, judgment or discretion on its own part." *Hansen Baking*, 48 Wn.2d at 743-44. And they protect against that unfairness by prohibiting the Department from "retroactively" assessing the taxpayer and "collect[ing] back taxes." DISH Br. 65-66 (quoting *Port of Seattle*, 101 Wn. App. at 118); *supra* 9. So these cases again show that the proper remedy for the Department's repudiation of its own tax instruction is a full refund.

3. Just as telling as its failure to distinguish DISH's authorities is the Department failure to cite any of its own. It identifies no case in which an established claim of equitable estoppel was remedied not by *barring* the defendant's repudiation, but instead *installing* that repudiation retroactively. Nor does it cite a case in which a court has estopped a repudiation, but then declined to remediate the repudiation's full effects. In short, the Department identifies no court that has

ever imposed a remedy like the one here. The Superior Court erred in being the first to do so.

II. The Superior Court Properly Found For DISH On Its Estoppel Claim.

Unable to justify the Superior Court's *remedy* for DISH's established estoppel claim, the Department circles back to the *merits* of equitable estoppel. DOR RB 54. But this time it advances a unique set of arguments, apparently applicable solely to the additionally assessed tax, as though there were two estoppel claims instead of one. Both the notion of this separate estoppel claim and the Department's arguments are divorced from the record, law, and Superior Court's decision. *Infra* § I.A. Anyway, as the Superior Court held, DISH established the elements of estoppel. *Infra* § I.B.

A. The Department's attack on the merits of DISH's estoppel claim is irrelevant to the cross-appeal and meritless.

1. There is just one estoppel claim.

The Department argues that DISH "offers almost no cogent analysis" that it "meets … the elements of equitable

estoppel" for "its claim for refund of [the] tax." DOR RB 54 (capitalization omitted). And repeatedly it says that DISH failed to discuss the elements of estoppel "in its cross-appeal." *E.g.*, DOR RB 50, 60-61. This is befuddling. The Department seems to assume there are two estoppel claims in this case, one for penalties and interest and a different one for the tax.

There is one claim for estoppel. As the Superior Court understood, "[t]he claim presented by Plaintiff at trial was for a refund of [B&O] taxes, penalty, and interest paid in 2014." CP 1038. That is the claim on which the parties sought findings of fact and conclusions of law, and that is the claim on which the Superior Court found for DISH on each element. The Department never argued its separate-claim theory to the Superior Court. And the Superior Court's decision not to refund the tax had nothing to do with the Department's new, unlitigated concept of a separate claim.

This late-breaking exercise in confusion should be rejected. All that is at issue in the cross-appeal is whether the

Superior Court, having found for DISH on its single estoppel claim, erred in its remedy. It speaks volumes that the Department's apparent strategy for defending that remedy is to concoct a new shadow claim and then criticize DISH for not discussing it.

2. DISH did not and does not admit it owes the additionally assessed tax.

Still more detached from reality is the Department's repeated assertion, without citation, that DISH "admits it owes" the B&O tax it seeks to have refunded. DOR RB 2-3, 50, 52, 55, 56, 58, 59, 60, 61, 62. This false contention is the basis for the Department's argument that "DISH [i]s not injured by paying B&O tax it admittedly owes" and that "payment of B&O tax [DISH] admits it owes" cannot be "a manifest injustice." DOR RB 55, 59.

But DISH did not and does not concede that it "owes" the B&O tax. It is true, as the Department notes, that DISH initially directly challenged the Department's changed interpretation of the B&O tax provision, but later dropped this challenge in favor

of its estoppel claim. *E.g.*, DOR RB 62. But this was no concession. Rather than litigate the mysteries of a defunct and inscrutable statute, DISH pursued a simpler path to relief based on the Department's directive in the 2008 Workpaper and its subsequent repudiation. Pursuing that simpler claim in no way conceded that the Department's repudiation was correct. DISH explained this in its brief (at 31 n.4), and the Department has offered no response.

Nor did DISH's counsel concede that the tax was owed by pointing out that the Department's belated repudiation denied DISH the opportunity to file an amended tax return. *Cf.* DOR RB 36 (citing 4 RP 17). Instead, at the post-trial hearing on the judgment, DISH first argued that the Court should "award a refund of all the amount of taxes, penalties, and interest owed." 4 RP 5, 8-9. Only after the Court said it would not refund the tax did DISH's counsel note that, at a minimum, the trial evidence could support a finding that "as of January 1,

… Dish would … have paid the, quote, correct amount of tax." 4 RP 16-17. Again, that is no concession.

Perhaps the reason the Department so strenuously presses its fictionalized claim of a DISH concession is that the Department did not actually litigate the issue itself. If it thought the proper reading of the B&O statute was legally important (it is not, *see infra* 18-19), the Department could have undertaken to show that DISH did indeed owe the taxes. It did not. So whether the Department's repudiation was substantively correct is beside the point on this record.

3. Whether the Department's repudiation is correct is legally immaterial to DISH's estoppel claim.

The correctness of the Department's repudiation is also legally inconsequential. To satisfy the elements of estoppel, the Department's repudiated position need not be wrong; it just needs to differ from the Department's prior position.

Again, the case law bears this out. *Harbor Air* did not depend on whether the Department's later position was actually

right. The Court found estoppel and imposed a full remedy based on the contradiction alone. 88 Wn.2d at 367-68. Nor did *Hansen Baking*, in which the Supreme Court acknowledged that it "may well be that the [government] erred in making the factual determination, or exercised unsound judgment, or abused his discretion in reaching the conclusions represented by the administrative ruling," but ordered a full refund regardless. 48 Wn.2d at 743. Likewise, in *Kramarevcky*, the Court explicitly rejected the notion that the plaintiffs' "substantive ineligibility" for previously paid public benefits foreclosed a claim estopping the government from clawing back those benefits. 122 Wn.2d at 746.

These cases reflect the pragmatic recognition underlying equitable estoppel: representations and repudiations do not occur in a vacuum. Parties like DISH order their affairs in accordance with the government's representations, and—without estoppel—must expend time and resources unwinding, reconstructing, or amending their plans to accommodate

contradictions years later. If the Department could "retroactively impeach" its own guidance whenever it decided its previous instructions were wrong, "taxpayers would never be able to close their books with assurance." *Hansen Baking*, 48 Wn.2d at 743-44.

B. DISH established the elements of estoppel with respect to the B&O tax.

Although the Department's arguments on the elements of equitable estoppel are irrelevant to the cross-appeal, DISH nevertheless addresses them here. For reasons already explained, the Superior Court properly found that DISH proved the elements of estoppel. The Department's arguments to the contrary rest on rhetoric instead of the record before the Superior Court.

Before turning to the elements, it bears note that the Department ultimately concedes DISH's point that the proper standard of review is supplied by *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 375, 113 P.3d 463 (2005). *See* DOR RB 5-8 (citing *Niemann* favorably). As *Niemann* (and

DISH, *see* DISH Br. 37) explains, the court must "give deference to the trial court's factual determinations but review the trial court's grant of equitable relief de novo." 154 Wn.2d at 375. And "[t]he elements of equitable estoppel present essentially factual issues." *Litz v. Pierce Cnty.*, 44 Wn. App. 674, 683, 723 P.2d 475 (1986); *see Engelland*, 180 Wn. App. 1018, at *5 (unpub); DISH Br. 36. So the myriad factual quibbles the Department raises—from witness credibility, to DISH's reliance, to the nature of the 2008 Workpaper—are therefore reviewed only for substantial evidence.

1. The Department's statement in the current audit is inconsistent with its 2008 Workpaper.

Substantial evidence supports the Superior Court's finding that the 2008 Workpaper is "a statement … by the party to be estopped, which is inconsistent with its later claims." DISH Br. 19-20, 24 (citing CP 1042-43, 1049). DISH already explained at length why the Department's May 2008 generalized invocation of Rule 194 could not have superseded

its direction in the Workpaper to exclude programming cost—it was little more than a direction to follow the law, whatever it may be. DISH Br. 38-43. So too DISH explained why no taxpayer would regard the 2008 Workpaper as merely backward looking. The law did not change, so DISH carried the Department's guidance forward. DISH Br. 41-43.

That leaves the Department to concoct a new argument. It now claims that Workpaper A is not the Department's statement because "it only applied the cost apportionment computation DISH had already been using at the time." DOR RB 16. Because it "reinstate[d] *DISH Network*'s cost computation," the Department asserts, "*the Department* did not provide DISH with inconsistent statements." DOR RB 17 (emphasis added).

The Department has never argued this before, and it directly contradicts representations in the Workpaper itself and made by the Department in the Superior Court and this Court. The Amended Assessment incorporates Workpaper A by

directing DISH to "[r]efer to" it "for the cost apportionment detail." Ex. 10, p. 4. At summary judgment, the Department acknowledged authorship, explaining that, in it, "*the auditor … comput[ed]* Dish Network's B&O tax liability." CP 933 (emphasis added); *see also* CP 915. At trial, the Department put on no evidence to contradict Martin Noli's testimony that the Workpapers "represent[]" the Department's calculation of DISH's taxes. 1 RP 69; *see* DISH Br. 12. And in its Opening Brief, the Department asserted that the 2008 Workpaper was its "mistake." DOR OB 39.

The Superior Court correctly found that the Department directed DISH to pay taxes based on the Workpaper the Department prepared.

2. DISH reasonably relied on the 2008 Workpaper.

The evidence also supports the Superior Court's factual finding that DISH reasonably "relied on" the 2008 Workpaper "as confirmation of the correctness" of its apportionment calculation. CP 1043 (Trial Order ¶ 17); *see* DISH Br. 24-25.

As DISH's Brief explains, DISH proved that had Workpaper A included programming costs, DISH would have followed its normal practice of amending its returns or disputing the audit. DISH Br. 17-18 (citing 1 RP 36, 39, 72), 43-44.

In reply, the Department repeats its clashing challenges. Doubting Mr. Noli's testimony, the Department asserts again that Mr. Noli "lack[ed] … personal knowledge with respect to reliance" because he was not in the compliance department when DISH prepared the 2006-2009 tax returns. DOR RB 30-31. Then reversing and crediting Mr. Noli's testimony, the Department argues that it shows that DISH's "practice was to appeal and 'fight … out' any audit adjustment that the company disagreed with," not amend. DOR RB 34, 43. But Mr. Noli's testimony was perfectly clear, and the Superior Court found it credible, on the topic of the reliance DISH's tax employees place on departmental guidance like the Workpaper. DISH Br. 44-45. So too the Court found that DISH "would have" taken one of two actions (amend or challenge) to avoid a large, late

tax liability. DISH Br. 20, 44-45. That plainly constitutes credible evidence of reliance on the Department's position in the 2008 Workpaper.

3. DISH suffered financial injury.

DISH "was financially injured by the Department's change-in-position." CP 1043 (Trial Order ¶ 18). The Department's three attempts to undermine this finding fail.

First, the Department asserts that DISH was not financially injured because DISH "admits it owes" the tax, passed the tax onto customers, and had an opportunity to challenge the tax. DOR RB 58. Again, DISH does not admit it owes the tax. *Supra* 16-18. As for passing on the costs of tax liability, the evidence is that, as a result of the Department's vacillations, DISH *could not* accurately account for its tax liability in its subscription costs. DISH Br. 18, 69-70. And although DISH was able to challenge the Department's application of Rule 194 earlier in this case, DOR RB 58, it was deprived of the opportunity to do so in real time, without the

threat of penalties, interest, and a late and unexpected tax liability looming.

Second, the Department asserts that "the trial court made no specific finding of injury other than the conclusory statement that DISH 'was financially injured.'" DOR RB 55. Not so. The Superior Court found that the Department's repudiation "cost DISH millions in penalties, interest, and the difficulty of recovering the underpaid tax through its business operations." CP 1043 (Trial Order ¶ 17). Substantial evidence supports that finding, as the Department's own block quotation of Mr. Noli's testimony shows. DOR RB 56-57 (citing 1 RP 76-77).

The Department refuses to credit this evidence based on its repeated and unsupported assertion that any testimony about DISH's routine practices is insufficient. *Supra* 24-25; *e.g.*, DOR RB 31, 59; *cf.* DISH Br. 45. But the Superior Court credited Mr. Noli's testimony about these practices, CP 1039, and the Department does not contest this credibility finding. Nor, at trial, did the Department cross-examine Mr. Noli or put

on its own contrary evidence on DISH's practices or the consequences to DISH of this late assessment. The evidence thus clearly shows DISH's injury, and there is no contrary evidence refuting it.

Third, the Department argues that DISH's injury must be "based on something other than" the financial injury. *See* DOR RB 58. But it is. As DISH's Brief explains (at 69-70), the large, late tax prevented DISH from making timely decisions about its operations and taxes. There is "no … requirement under Washington law" that the "injury is limited to the amount of" harm caused "as a direct consequence of" the Department's first statement. *Kramarevcky v. Dep't of Soc. & Health Servs*., 64 Wn. App. 14, 20 n.1, 822 P.2d 1227 (1992). Rather, the lost opportunity to "structure" its business in light of the tax is a recognized injury beyond "the mere obligation to []pay" the tax. *Kramarevcky*, 122 Wn.2d at 747, 745.

4. The Department's repudiation causes manifest injustice.

The Superior Court properly held that "[a]llowing the Department to reach an inconsistent conclusion in the instant audit would cause manifest injustice." CP 1043 (Trial Order ¶ 19); DISH Br. 48 (citing *Wilson v. Wash. State Dep't of Ret. Sys.*, 15 Wn. App. 2d 111, 127, 475 P.3d 193 (2020)). None of the Department's objections show otherwise.

First, the Department contends that the Superior Court's finding "only applied to the 10% negligence penalty." DOR RB 40-41. That is incorrect. The Superior Court found it "manifestly unjust not to give the taxpayer relief for following the instructions" that "commanded DISH's compliance" *through* the negligence penalty. CP 1043 (Trial Order ¶ 19). That is, it noted the negligence penalty as a reason that DISH had little choice but to follow the Department's "specific

written instructions."[2] *See* Ex. 10, p. 3. That finding does make the Department's subsequent disavowal of its own binding instructions any less unjust as to other consequences flowing from its repudiation.

Second, the Department argues that DISH "assumed the risk" of reliance by failing to confirm the Workpaper's application to the revised Rule 194's cost apportionment method. DOR RB 40. But as DISH has previously explained, the case law squarely rejects the argument that it is a taxpayer's obligation to ensure that the government means what it says. DISH Br. 47-48 (citing *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 339-42, 779 P.2d 249 (1989)).

That is all the more true where, as here, the legal regime at issue is unusually vexing. DISH Br. 46-47. In *Silverstreak*,

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[2] Once the Department classifies a document as "specific written instructions," if the taxpayer "disregard[s]" the document, the Department "must add a penalty of ten percent of the amount of the tax that should have been reported." RCW 82.32.090(5).

faced with "confusing memoranda and regulations promulgated by the Department," the plaintiffs followed the "plain reading" of an interpretative policy memorandum. 159 Wn.2d at 889 & n.8, 902. The Supreme Court held that the "confusing" nature of the general guidance, coupled with the plaintiffs' reliance on the Department's memo, created a "manifest injustice" in the Department's repudiation, even though the memo "was not tailored to the specific facts of th[e] case" and the plaintiffs "did not contact the Department" to clarify the memo. *Id.* at 905 (Fairhurst, J., concurring); *id.* at 889 n.8, 902-03. Here, the manifest injustice is even clearer, because the Department's direction was tailored to DISH's specific calculations.

Third, the Department argues that DISH fails to satisfy *Kramarevcky*'s "nonexclusive factors" for manifest injustice. DOR RB 60. But there are no "factors" to satisfy. Whether an injustice exists depends on the facts of each case. The Department, so notoriously unable to apply a tax statute that the legislature amended it, told DISH to pay taxes one way and

then claimed DISH had done it wrong, charging DISH $11 million for the Department's mistake. DISH Br. 25-26, 40-41, 48. It is hardly surprising that the Superior Court found that unfair—anybody would.

Finally, the Department argues there is no injustice because DISH initially said in its administrative appeal that it did "not comply[] with Rule 194(4)" because "the rule was invalid." DOR RB 41 (citing Ex. 4). But, as DISH's Brief explains, DISH's administrative appeal set out the crucial reason for DISH's ongoing reliance on Workpaper A: "[T]he Department did not make changes to its statute regarding the specific apportionment formula" before and after 2006. DISH Br. 15 (citing Ex. 4, p. 3), 41-43. Anyway, DISH's 2011 litigation strategy is not evidence of its 2008 reliance. That evidence was provided and credited in the Superior Court. The Department offers no good reason to relitigate it here.

5. Estopping the Department will not impair tax collection.

Estopping the Department from repudiating the 2008 Workpaper "will not … impair … governmental function." CP 1043 (Trial Order ¶ 20). This case concerns the "highly-fact specific" application of estoppel to a cost borne by only two companies, under a statute no longer in force, so it is simply not plausible that it will "open floodgates to litigation." CP 1043 (Trial Order ¶ 20); DISH Br. 26.

The Department's contrary suggestion is again based on its erroneous suggestion that DISH "admits" it "ow[e]s" the tax. DOR RB 61-62. The Department need not worry that this case will create a precedent for refunding taxes that are admittedly owed, because DISH admitted no such thing. *Supra* 16-18. Nor does this case estop the Department based merely on "an auditor's oversight in a prior audit." DOR RB 61-62. So any precedent here would apply only when the Department affirmatively states a taxpayer's obligation, "provid[ing] an

impetus for [the agency] to more adequately monitor and control" its instructions, *Kramarevcky*, 122 Wn.2d at 749.

In short, to avoid this result in the future, the Department can simply elect not to saddle taxpayers with immense retroactive tax liability based on repudiations of its own written guidance. Where it does so, estoppel is eminently fair. And where, as here, a court finds estoppel to be appropriate, the only just result is to hold the Department to its word. The tax should be refunded to DISH along with penalties and interest.

CONCLUSION

The Superior Court's order and judgment on penalties and post-2008 interest should be affirmed. The Superior Court's order and judgment denying refund of the additional B&O tax and pre-2009 interest should be reversed and remanded with instructions to refund the tax, penalties, and all interest.

This document contains 5,337 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED THIS 7th day of November 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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